Supreme Court, U.S.
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No. 92-409

In The
Supreme Court of the United States
October Term, 1992

PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
Petitioner,

v.

FREDERICK LASHLEY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The first question as stated by the Petitioner does not fully reflect all of the facts. Properly stated, they are:

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE TRIAL COURT TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT WAS PREVENTED BY THE TRIAL COURT THROUGH AN ERRONEOUS EVIDENTIARY RULING FROM PRESENTING AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION.

II.

WHETHER A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED A HARMLESS ERROR WHEN REVIEWED IN A FEDERAL HABEAS CORPUS ACTION?

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PAUL DELO, SUPERINTENDENT
Potosi Correctional Center,
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v.

FREDERICK LASHLEY,
Respondent

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Frederick Lashley, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the panel opinion of the United States Court of Appeals for the Eighth Circuit reversing and remanding Respondent's sentence of death.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Eighth Circuit issued its opinion on March 4, 1992. Superintendent Delo's petition for rehearing or rehearing en banc was denied by the Court of Appeals on July 1, 1992. Pursuant to 28 U.S.C., Section 2201(c) and Supreme Court Rule 13.1, the present petition for a writ of certiorari was filed by Petitioner within ninety (90) days.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions set forth in Petitioner's petition, this case also involves the following Missouri statute:

> Court orders not to affect civil rights - not evidence, exception
>
> 1. No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.
> 2. No child shall be charged with a crime or convicted unless the case is transferred to a court of general jurisdiction as provided in this chapter.
> 3. After a child is taken into custody as provided in section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court, are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceeding, civil or criminal, other than proceedings under the chapter.
> 4. The disposition made of a child and the evidence given in the court does not operate to disqualify the child in any future civil or military service application or appointment.
>
> Missouri Revised Statute, Section 211.271

STATEMENT OF THE CASE

Respondent, Frederick Lashley, was convicted of capital murder, Section 565.001, Missouri Revised Statute (1978)(Repealed October 1, 1984), for which he was sentenced to death by the Circuit Court of the City of St. Louis, Missouri. The circumstances surrounding Respondent's crime were summarized by the

Missouri Supreme Court on direct appeal.

Defendant, Frederick Lashley, 17, was convicted of the capital murder of his physically handicapped 55-year-old cousin and foster mother, Janie Tracy, while robbing her of $15. The punishment prescribed by the jury and approved by the trial court is death. We affirm.

The victim lived alone in a downstairs apartment in the City of St. Louis, She had heart rouble, diabetes and a neuromuscular problem that caused her to limp and required her to use a walking cane. She had difficulty walking since she had undergone a brain operation a number of years ago. The operation had resulted in the removal of a portion of her skull on the left side of her head. Defendant had lived with and been cared for by Miss Tracy (and her mother) from the time he was two years of age until he was sixteen years old. He had been present on occasions when there had been discussions concerning the soft spot on Miss Tracy's head.

On the night of April 9, 1981, Miss Tracy was visiting her sister, Mrs. Williams, who lived several blocks from the Tracy apartment. Sometime before 8:30 p.m., Defendant entered the apartment by climbing through the top of a window on the rear porch. He unscrewed the light bulb in the front room so that the light would not come on when the switch was turned on. His admitted purpose was to ambush Miss Tracy and take her money when

she returned home. Defendant, armed with a cast iron skillet (and the jury could reasonably find he also had a butcher knife having a seven and one-half inch blade), waited in the dark in the bedroom adjacent to the front room.

Miss Tracy left her sister's home between 8:00 and 8:30 p.m., driving her car. In his confessions to the police, one of which was videotaped, Defendant stated that when Miss Tracy entered the front door of the apartment, she attempted to turn on the light. When the light did not come on she started into the room where Defendant was waiting. As she reached for the light switch he struck her in the head with the iron skillet, breaking it into two pieces. He said she fell and began screaming and he put his hand over her mouth. When asked where the knife came from the Defendant stated:

> Off the floor. It was on-well, really it was on the floor. That's-I mean, you know, I just see the knife and then I grabbed it, you know. And then she had it in her hand. We both had it. And then I finally got it-got it back and then that's when I struck her with it.

Defendant took $15 and car keys from Miss Tracy's purse, locked the front door on the way out of the apartment, and drove off in the victim's automobile. He was apprehended while driving the stolen vehicle shortly

after midnight.

An upstairs neighbor of Miss Tracy, Mrs. Ali, 81, had heard screams followed by something which sounded "like a fall" from the downstairs apartment. She telephoned the Tracy apartment and when she did not get an answer, called Mrs. Williams to come over and investigate. Mrs. Williams and her husband went to her sister's apartment shortly after 8:30 p.m. Mrs. Williams noticed her sister's car was not parked outside. She had a key to the apartment and upon entering it, saw her sister on the floor of the bedroom, bleeding about the head. She also saw a butcher knife near Miss Tracy and a broken skillet on the bedroom floor. Police and medical assistance were immediately summoned.

Hospital records showed Miss Tracy was comatose and brain dead when she arrived at the hospital. She had a cut on her head above the right ear, "defense" knife cuts on her fingers, and a one-inch incision above her left ear where the knife entered her skull through the soft spot and penetrated her brain. This stab would cause her death approximately 48 hours later.

Defendant did not testify at trial but his written and videotaped confessions were introduced by the State. In both, he admitted striking the defenseless woman with the skillet with sufficient force to knock her down and then plunged the butcher knife into her head.

State v. Lashley, 667 S.W.2d 712, 713-715 (Mo.banc)(footnote omitted), cert. denied, 469 U.S.873 (1983). On the basis of the evidence introduced at trial, the jury found Respondent guilty of capital murder.

During the conference preceding the penalty phase, attorney for the Defendant made a motion in limine to prevent the state from introducing any evidence of Lashley's juvenile record. After a conference between both attorneys and the court, it was determined that in the event the Defendant entered any evidence of a criminal record, the court would allow the state to introduce the juvenile record of the Defendant. As a result of this position by the court, there was no evidence introduced that the Defendant had no significant history of prior criminal activity. The mitigating circumstances' instruction requested by the Defendant was denied by the court (App.A-82 - A-89). The jury found that a statutory aggravating circumstance did, in fact, exist and they assessed capital punishment as the Respondent's penalty. The Missouri Court upheld the conviction and sentence on direct appeal. Lashley v. State, 721 S.W.2d 31 Mo.App.,E.D.1986, cert. denied.

Respondent, Lashley, then sought post conviction relief pursuant to former Missouri Court Rule 27.26 (Repealed effective 1988) and this motion was denied by the Circuit Court of the City of St. Louis, Missouri. The appeal to the Missouri Court of Appeals was denied, Lashley v. State, 721 S.W.2d 31 Mo.App.,E.D.1986, cert.denied.

Lashley then filed a petition for a writ of habeas corpus on

May 14, 1987, in the United States District Court for the Eastern District of Missouri (App. A-64 - A-77). Judge Edward Filippine denied each allegation contained in Respondent's petition (App. A-24, A-25 - A-27, A-28 - A-29, A-30 - A-31). The District Court granted a certificate of probable cause for appeal.

On appeal, the United States Court of Appeals for the Eighth Circuit found the Respondent was denied protection of the Eighth Amendment as a result of the Missouri trial court's refusal to give a mitigating circumstance instruction that had been requested. Lashley v. Armontrout, 957 F.2d 1495,1501-1502(8th Cir.1992)(App. A-1 - A-21)

Petitioner's petition for rehearing or rehearing en banc was denied by the Court of Appeals on July 1, 1992. (App. A-22). The present petition for writ of certiorari is now before this Honorable Court.

ARGUMENT

I.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE A STATE TRIAL COURT TO INSTRUCT THE JURY ON A SPECIFIC STATUTORY MITIGATING CIRCUMSTANCE (THAT THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF CRIMINAL ACTIVITY) WHEN THE CRIMINAL DEFENDANT WAS PREVENTED BY THE TRIAL COURT THROUGH AN ERRONEOUS EVIDENTIARY RULING FROM PRESENTING AFFIRMATIVE EVIDENCE DURING THE GUILT PHASE OR THE PUNISHMENT PHASE OF THE CRIMINAL TRIAL (THEREBY LEAVING A "BLANK SLATE" BEFORE THE JURY) TO SUPPORT THE INSTRUCTION.

Respondent, Lashley, was convicted of capital murder in the City of St. Louis. All state appellant processes were exhausted by the Defendant and a Federal habeas corpus action was filed in

the United States District Court. Respondent's writ of habeas corpus was denied in the United District Court but on appeal to the United States Court of Appeals for the Eighth District, a three-judge panel overturned the sentence on the basis of an Eighth Amendment violation which occurred during the penalty phase of the trial proceeding.

The Court of Appeals determined that it was constitutional error for the Missouri trial court to refuse Respondent's requested instruction which would have informed the jury that they consider as a mitigating factor the fact that Defendant had "no significant history of prior criminal activity". Missouri Revised Statutes, Section 565.032.3(1)(Supp.1990). The Trial Court overruled Respondent's motion in limine to prevent the State of Missouri from introducing any evidence of Respondent's juvenile record if Respondent attempted to introduce evidence of his lack of significant history of prior criminal activity. As a result of this ruling, the Respondent was prohibited from introducing evidence which would have supported the giving of the instruction which would have informed the jury that they consider the fact that Defendant had "no significant history of prior criminal activity". The Court of Appeals found that the actions of the trial judge violated Respondent's Eighth Amendment right as set out in Lockett v. Ohio, 438 U.S.586, 604(1978), and that the court, in fact, should have submitted the requested instruction to the jury for their consideration. Lashley v. Armontrout, 957 Fed.2d 1495, 1501(Eighth Cir.1992). The decision of the Eighth Circuit Court

of Appeals is completely consistent with this court's Eighth Amendment jurisprudence and Missouri Law which governs procedures applied in capital cases. In this particular case the trial attorney filed a motion in limine to prevent the state from introducing any evidence of Lashley's juvenile record. The trial court's overruling of this motion is clearly contrary to state law which provides:

> 1. No adjudication by the juvenile court on the status of a child should be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction nor shall the child be found guilty or be deemed a criminal by reason of the adjudication.
>
> . . .
>
> 3. After a child is taken into custody as provided in Section 211.131, all admissions, confessions, and statements by the child to the juvenile officer and the juvenile court personnel and all evidence given in cases under this chapter, as well as all reports and records of the juvenile court are not lawful or proper evidence against the child and shall not be used for any purpose whatsoever in any proceedings, civil or criminal, other than proceedings under this chapter. Missouri Revised Statutes, Section 211.271(1978)(Emphasis supplied).

It is clear from the review of the transcript of the pre-trial conference (App.A-82 - A-89) that if the trial attorney had introduced evidence that Lashley had no prior significant criminal activity, that the trial judge would have erroneously allowed the state to introduce evidence of juvenile offenses. It is also clear that the writer of the opinion submitted by the Eighth Circuit Court of Appeals came to the same conclusion and stated so in the footnote contained in the opinion. (App. A-9 - A-10)

The majority opinion also noted that it was unlikely that the prosecution could have supported a finding of "significant history

of prior criminal conduct" due to the fact that Lashley was seventeen years of age at the time the offense was committed. This opinion is supported by, and consistent with, the landmark case of Lockett v. Ohio, 438 U.S.586 at 604, which states:

> The Eighth and Fourteenth Amendments require that the sentencer in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. This strong position is based on the belief that when dealing in capital cases each individual is entitled to have every aspect of their being considered by the sentencer in order to insure that the ultimate punishment is properly administered.

As the Supreme Court made clear in Woodson v. North Carolina, 428 U.S.280,96 S.Ct.2978,49 L.Ed.2d 944(1976), "in capital cases the fundamental respect for humanity, the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". Id. at 304 96 S.Ct. at 2991 (Opinion of Stewart, Powell and Stevens, JJ.). It is well accepted that the court views capital cases differently than non-capital cases since the imposition of death is so different from any other penalty which can be imposed by the court. The court goes to great lengths to insure that the sentencer has available for consideration any aspect of the accused which may reflect on the character and propensities of the offender before pronouncing sentencing. Lockett v. Ohio, 438 U.S.586(1978). Judge Fagg stated in his dissenting opinion that there is no dispute when there is

evidence before the court of a mitigating circumstance that the defendant is entitled to an instruction on that evidence. Judge Fagg believed in this case that the court misapplied Lockett for the reason that the trial court had no evidence to support the instruction of mitigating circumstance of "no significant history of prior criminal activity". Lashley, 957 Fed.2d at 1503(Fagg J. dissenting). As was noted in the majority opinion, the sole reason that there was no evidence presented by the Defendant concerning his lack of significant history of prior criminal activity was due to the erroneous position of the trial judge who indicated that he would allow the juvenile record of the Defendant to be presented to the jury in the event there was any attempt by the Defendant to introduce a lack of criminal history. The admission of this evidence for any reason is obviously in direct conflict with Missouri Statutes, Revised Statutes of Missouri, Section 211.271(1978). The effect of the trial court's position was to preclude the sentencer from considering a mitigating factor before imposing final sentence. In Eddings v. Oklahoma, 455 U.S.104,102 S.Ct.869,79 L.Ed.2d1 1982, the court held, "the majority of the court reaffirmed that a sentencer may not be precluded from considering or may not refuse to consider any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death". In the case of Mills v. Maryland, 108 S.Ct.1860(1988), the court drew added emphasis to its opinion in Eddings when it stated that this position was beyond dispute in a capital case. The court further stated in Mills v. Maryland, Id

at 1866, "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating circumstances interposed by statute, Lockett v. Ohio, Supra. Hitchcock v. Dugger, 481 U.S.391(1987). 107 S.Ct.1821, 95 Lawyer's Ed.2d 347(1987); by the sentencing court, Eddings v. Oklahoma, Supra.; or by an evidentiary ruling, Skipper v. South Carolina, 476 U.S.2(1986) . . .; because the (sentencers) failure to consider all the mitigating evidence risks erroneous imposition of the death sentence in plain violation of Lockett, . . .". The court specifically held in Skipper v. South Carolina, 106 S.Ct. 1669, 1673(1986) "that the exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender".

In this particular case, the court reversed the sentencing of the Defendant for the reason that the trial judge made an erroneous evidentiary ruling which prevented the sentencer from considering the mitigating evidence. It is the contention of the Respondent that this is exactly what occurred to Frederick Lashley in the case at bar. The sole reason that the evidence Judge Fagg was searching for to support the mitigating circumstance instruction as submitted by trial counsel was not in evidence was due to the court's clear misapplication of Missouri Law.

The sentencer's consideration of the mitigating factor of Defendant's lack of significant history of prior criminal activity is crucial in order to assure that the death penalty is properly

administered. The court has gone so far as to hold that not only may the state not preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant, mitigating evidence. Penry v. Lynaugh, 109 S.Ct.2934(1989), the court further stated that:

> "A state could not, consistent with the Eighth and Fourteenth Amendment, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or to the circumstances the offense that mitigates against imposing the death penalty." Id. at 2946.

The court further stated:

> "Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must be able to give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct.1821, 95 Lawyer's Ed.2d 347(1987). Only then can we be sure that a sentencer has treated the defendant as a "uniquely individual human being" and has made a reliable determination that it is the appropriate sentence." Id. at 2947.

It is the contention of the Respondent and the belief of the Eighth Circuit Court of Appeals that a trial judge through an erroneous interpretation of the law not be permitted to do what the state itself is specifically prohibited from doing. It is clear from the transcript that had the trial judge followed Missouri Statutes and ruled accordingly, evidence would have been introduced which would have shown that Lashley had "no significant history of prior criminal activity" and as a result, the mitigating circumstance instruction would have been submitted to the jury for their consideration and all of the standards set forth in Lockett would have been met.

We are in a unique position here in that there is evidence contained in the transcript (App. A-82 - A-89) which clearly shows efforts by the Defendant to introduce evidence which would have unquestionably supported an instruction of "no significant history of prior criminal activity".

The decision as handed down by the Eighth Circuit Court of Appeals is clearly not within the standards as set forth in Rule 10.1(a)(b)(c) of the Rules of the Supreme Court for the granting of a writ of certiorari. Looking at all aspects of this case, taking into consideration the entire transcript and the law applicable as the Eighth Circuit Court of Appeals has done, it is clear that the result reached by the Eighth Circuit Court of Appeals is consistent with all other opinions cited by Petitioner and is in no way a departure from the accepted and normal course of judicial proceedings.

II.

WHETHER A STATE TRIAL JUDGE'S OMISSION TO INSTRUCT THE JURY ON A MITIGATING CIRCUMSTANCE CAN BE CONSIDERED A HARMLESS ERROR WHEN REVIEWED IN A FEDERAL HABEAS CORPUS ACTION?

Petitioner has stated in their petition that even if the state trial court committed a constitutional violation by refusing to give the mitigating circumstance instruction concerning Respondent, Lashley's, lack of significant history of prior criminal conduct, that it is harmless error. The thrust of Petitioner's argument is that there was no need for a specific instruction on the mitigating circumstance of "no significant history of prior criminal activity", that the jury was obviously aware that there was no

evidence of a significant prior criminal misconduct and, therefore, it can be presumed they gave due consideration to this fact. The Court has specifically rejected this contention in Penry and have repeatedly held that in order to insure a jury's consideration of any mitigating circumstance, there must be a specific instruction. Absent such instruction, the court can never be sure that a jury fully considered the effect of that particular mitigating circumstance. The only conceivable, positive fact that Lashley had going for him was his lack of prior significant criminal activity. It is inconceivable for Respondent to understand how the Petitioner can argue at this point that the instruction, or lack thereof, is unimportant and insignificant when their trial attorney fought so desperately hard to prevent the giving of it during the penalty phase. There is no logic to the position that the failure to give a mitigating circumstance instruction during the penalty phase would be harmless and insignificant. This particular instruction is absolutely critical. The most fundamental element of all cases pertaining to the death penalty is whether or not defendant received a fair and impartial trial from a fully informed jury. To deny a jury this particular instruction and then argue that it is harmless error is to, in effect, say all instructions are insignificant. It is impossible for the State of Missouri or this Honorable Court to do anything more than speculate as to reasoning and thinking behind the jury's decision. In a case involving the ultimate penalty, this is not enough. We must be certain that the jury at least considers certain basic fundamental points in order

to guarantee a defendant every constitutional right to which he is entitled. The court has held that the strict standard of "beyond a reasonable doubt" shall be used in determining if proposed mitigating evidence regarding a defendant's character would not have influenced a jury in Hitchcock v. Dugger, 481 U.S.391(1987). Only the twelve jurors who sat in judgement on Frederick Lashley can state beyond a reasonable doubt whether or not they would have been influenced by the admission of this evidence. This is consistent with what the Eighth Circuit Court of Appeals has recommended when they determined that this matter should be sent back for resentencing. As a result, this Honorable Court should allow the Eighth Circuit Court of Appeals' ruling to stand and let a jury who sat in judgement of Mr. Lashley determine his fate.

CONCLUSION

Respondent respectfully requests that this Court deny Petitioner's Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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